

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

10 GLENN A. COON,  
11 Plaintiff,  
12 v.  
13 JO ANNE B. BARNHART,  
14 Commissioner of Social  
15 Security,  
Defendant. )  
 ) No. CV-05-0339-MWL  
 )  
 ) ORDER GRANTING DEFENDANT'S  
 ) MOTION FOR SUMMARY JUDGMENT  
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17 BEFORE THE COURT are cross-motions for summary judgment,  
18 noted for hearing without oral argument on September 5, 2006. (Ct.  
19 Rec. 13, 17). Plaintiff Glenn A. Coon ("Plaintiff") did not file  
20 a reply brief in the case. Attorney Lana C. Glenn represents  
21 Plaintiff; Special Assistant United States Attorney Jeffrey H.  
22 Baird represents the Commissioner of Social Security  
23 ("Commissioner"). The parties have consented to proceed before a  
24 magistrate judge. (Ct. Rec. 8). After reviewing the  
25 administrative record and the briefs filed by the parties, the  
26 Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 17)  
27 and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

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## **JURISDICTION**

2 On October 22, 1999, Plaintiff protectively filed  
3 applications for Supplemental Security Income ("SSI") benefits and  
4 Disability Insurance Benefits ("DIB"), alleging disability since  
5 August 10, 1999, due to patellar femoral syndrome and problems  
6 stemming from being HIV positive. (Administrative Record ("AR")  
7 53-56, 68, 205-211). The applications were denied initially and  
8 on reconsideration. A hearing was held before Administrative Law  
9 Judge ("ALJ") R. J. Payne on October 5, 2000, and he issued a  
10 decision denying benefits on December 28, 2000. (AR 224-231).  
11 On February 6, 2003, the Appeals Council granted Plaintiff's  
12 request for review, vacated the former hearing decision, and  
13 remanded Plaintiff's case for further review. (AR 243-245).

14 On January 7, 2004, Plaintiff again appeared before ALJ R. J.  
15 Payne at which time testimony was taken from Plaintiff, medical  
16 expert Dr. Arthur Craig, and vocational expert Debra LaPoint. (AR  
17 394-447). On March 19, 2004, the ALJ issued a decision finding  
18 that Plaintiff was not disabled. (AR 18-26). The Appeals Council  
19 denied a request for review on August 30, 2005. (AR 8-11).  
20 Therefore, the ALJ's decision became the final decision of the  
21 Commissioner, which is appealable to the district court pursuant  
22 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
23 review pursuant to 42 U.S.C. § 405(g) on October 27, 2005. (Ct.  
24 Rec. 1).

## **STATEMENT OF FACTS**

26 The facts have been presented in the administrative hearing  
27 transcript, the ALJ's decision, and Plaintiff's brief and will  
28 only be summarized here. Plaintiff was 40 years old on the date

1 of the ALJ's decision. (AR 19). Plaintiff indicated that he  
2 completed high school and three years of college. (AR 74).  
3 Plaintiff's past relevant work consisted of work as a shipping  
4 clerk, a security officer, a store clerk, a metal worker, a  
5 cannery worker and a personnel clerk. (AR 69, 437). Plaintiff  
6 indicated that he stopped working on October 16, 1998, because the  
7 place where he worked had gone out of business. (AR 68).

8 **SEQUENTIAL EVALUATION PROCESS**

9 The Social Security Act (the "Act") defines "disability" as  
10 the "inability to engage in any substantial gainful activity by  
11 reason of any medically determinable physical or mental impairment  
12 which can be expected to result in death or which has lasted or  
13 can be expected to last for a continuous period of not less than  
14 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
15 Act also provides that a Plaintiff shall be determined to be under  
16 a disability only if any impairments are of such severity that a  
17 Plaintiff is not only unable to do previous work but cannot,  
18 considering Plaintiff's age, education and work experiences,  
19 engage in any other substantial gainful work which exists in the  
20 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
21 Thus, the definition of disability consists of both medical and  
22 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
23 (9<sup>th</sup> Cir. 2001).

24 The Commissioner has established a five-step sequential  
25 evaluation process for determining whether a person is disabled.  
26 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
27 is engaged in substantial gainful activities. If so, benefits are  
28 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If

1 not, the decision maker proceeds to step two, which determines  
2 whether Plaintiff has a medically severe impairment or combination  
3 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
4 416.920(a)(4)(ii).

5 If Plaintiff does not have a severe impairment or combination  
6 of impairments, the disability claim is denied. If the impairment  
7 is severe, the evaluation proceeds to the third step, which  
8 compares Plaintiff's impairment with a number of listed  
9 impairments acknowledged by the Commissioner to be so severe as to  
10 preclude substantial gainful activity. 20 C.F.R. §§  
11 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
12 App. 1. If the impairment meets or equals one of the listed  
13 impairments, Plaintiff is conclusively presumed to be disabled.  
14 If the impairment is not one conclusively presumed to be  
15 disabling, the evaluation proceeds to the fourth step, which  
16 determines whether the impairment prevents Plaintiff from  
17 performing work which was performed in the past. If a Plaintiff  
18 is able to perform previous work, that Plaintiff is deemed not  
19 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
20 At this step, Plaintiff's residual functional capacity ("RFC")  
21 assessment is considered. If Plaintiff cannot perform this work,  
22 the fifth and final step in the process determines whether  
23 Plaintiff is able to perform other work in the national economy in  
24 view of Plaintiff's residual functional capacity, age, education  
25 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
26 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

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1       The initial burden of proof rests upon Plaintiff to establish  
2 a *prima facie* case of entitlement to disability benefits.  
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
4 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
5 met once Plaintiff establishes that a physical or mental  
6 impairment prevents the performance of previous work. The burden  
7 then shifts, at step five, to the Commissioner to show that (1)  
8 Plaintiff can perform other substantial gainful activity and (2) a  
9 "significant number of jobs exist in the national economy" which  
10 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
11 Cir. 1984).

## STANDARD OF REVIEW

13                   Congress has provided a limited scope of judicial review of a  
14 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
15 the Commissioner's decision, made through an ALJ, when the  
16 determination is not based on legal error and is supported by  
17 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
18 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
19 1999). "The [Commissioner's] determination that a plaintiff is  
20 not disabled will be upheld if the findings of fact are supported  
21 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
22 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
23 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
24 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
25 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
26 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
27 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
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1 evidence as a reasonable mind might accept as adequate to support  
 2 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 3 (citations omitted). "[S]uch inferences and conclusions as the  
 4 [Commissioner] may reasonably draw from the evidence" will also be  
 5 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
 6 On review, the Court considers the record as a whole, not just the  
 7 evidence supporting the decision of the Commissioner. *Weetman v.*  
 8 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
 9 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

10 It is the role of the trier of fact, not this Court, to  
 11 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
 12 evidence supports more than one rational interpretation, the Court  
 13 may not substitute its judgment for that of the Commissioner.  
 14 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
 15 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
 16 substantial evidence will still be set aside if the proper legal  
 17 standards were not applied in weighing the evidence and making the  
 18 decision. *Brawner v. Secretary of Health and Human Services*, 839  
 19 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
 20 evidence to support the administrative findings, or if there is  
 21 conflicting evidence that will support a finding of either  
 22 disability or nondisability, the finding of the Commissioner is  
 23 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
 24 1987).

25 **ALJ'S FINDINGS**

26 The ALJ found at step one that Plaintiff has engaged in  
 27 substantial gainful activity since his alleged onset date, August  
 28 10, 1999. (AR 20). Specifically, the ALJ noted that Plaintiff's

1 earning records demonstrated that he earned \$7,285 in 2000 and  
2 \$8,656 in 2001. (AR 20). The ALJ concluded, however, that there  
3 had been no evidence that Plaintiff had engaged in any substantial  
4 gainful activity since 2001. (AR 25). At step two, the ALJ  
5 determined that Plaintiff has the severe impairments of human  
6 immunodeficiency virus and is on a military disability for  
7 chondromalacia of the knees, but that he does not have an  
8 impairment or combination of impairments listed in or medically  
9 equal to one of the Listings impairments. (AR 25). The ALJ  
10 specifically noted that the evidence of record did not support a  
11 finding that Plaintiff suffered from a severe mental impairment.  
12 (AR 23, 25).

13 The ALJ concluded that Plaintiff has the RFC to perform a  
14 wide range of sedentary level work activity. (AR 22). The ALJ  
15 found that Plaintiff maintained at least a two-hour standing and  
16 walking capacity, a six-hour sitting capacity, and a 10 pound  
17 lifting capacity. (AR 22-23). The ALJ also determined that  
18 Plaintiff requires medication, but he retained the ability to  
19 be/remain responsive and attentive, and was able to carry out  
20 normal work activities. (AR 23).

21 At step four of the sequential evaluation process, the ALJ  
22 found that Plaintiff could perform the exertional requirements of  
23 his past relevant work as a personnel clerk. (AR 23).  
24 Alternatively, the ALJ determined that, based on Plaintiff's RFC,  
25 age, education, and work experience, the Medical-Vocational  
26 Guidelines ("Grids") Rules 201.27-29 directed that, at step five  
27 of the sequential evaluation process, Plaintiff was not disabled  
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1 within the meaning of the Social Security Act. (AR 24). In  
2 addition, the ALJ noted that, based on the vocational expert's  
3 testimony and Plaintiff's RFC, age, education, and work  
4 experience, there were a significant number of sedentary-level  
5 jobs in the national economy which he could perform despite his  
6 limitations. (AR 24, 26). Examples of such jobs include work as  
7 a cashier, a telemarketer, an assembler and an appointment clerk.  
8 (AR 24, 26). Accordingly, the ALJ determined at step four of the  
9 sequential evaluation process, and alternatively at step five,  
10 that Plaintiff was not disabled within the meaning of the Social  
11 Security Act. (AR 25-26).

12 **ISSUES**

13 Plaintiff contends that the Commissioner erred as a matter of  
14 law. Specifically, he argues that:

15 1. The ALJ erred by finding that Plaintiff was not entirely  
16 credible;

17 2. The substantial weight of the record evidence does not  
18 support the ALJ's finding with regard to Plaintiff's residual  
19 functional capacity; and

20 3. The ALJ erred by relying on the vocational expert's  
21 testimony because it was based on a hypothetical which failed to  
22 include all of Plaintiff's limitations.

23 This Court must uphold the Commissioner's determination that  
24 Plaintiff is not disabled if the Commissioner applied the proper  
25 legal standards and there is substantial evidence in the record as  
26 a whole to support the decision.

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## **DISCUSSION**

#### A. Plaintiff's Credibility

Plaintiff argues that the ALJ's finding that Plaintiff was not credible was not properly supported. (Ct. Rec. 14, pp. 47-49). The Commissioner responds that the ALJ appropriately gave clear and convincing reasons, supported by substantial evidence, to find Plaintiff not credible. (Ct. Rec. 18, pp. 9-10).

8 It is the province of the ALJ to make credibility  
9 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
10 1995). However, the ALJ's findings must be supported by specific  
11 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
12 1990). Once the claimant produces medical evidence of an  
13 underlying impairment, the ALJ may not discredit her testimony as  
14 to the severity of an impairment because it is unsupported by  
15 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
16 1998) (citation omitted). Absent affirmative evidence of  
17 malingering, the ALJ's reasons for rejecting the claimant's  
18 testimony must be "clear and convincing." *Lester v. Chater*, 81  
19 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).

20 In this case, consistent with the evidence of record, the ALJ  
21 found that, while Plaintiff had been diagnosed with HIV in the  
22 Summer of 1999, there was little evidence of any significant  
23 limitations. (AR 22). When compliant with treatment for his HIV,  
24 it was reported that Plaintiff improved and was doing well. (AR  
25 406). When he was presumptively noncompliant with treatment, his

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1 condition declined.<sup>1</sup> (AR 400). Noncompliance with medical care  
 2 or unexplained or inadequately explained reasons for failing to  
 3 seek medical treatment cast doubt on a claimant's subjective  
 4 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885  
 5 F.2d 597, 603 (9<sup>th</sup> Cir. 1989).

6 The ALJ also found that Plaintiff's daily activities and  
 7 exhibited functional capacity level indicates that Plaintiff  
 8 functions as a level greater than he alleges. (AR 22). It is  
 9 well-established that the nature of daily activities may be  
 10 considered when evaluating credibility. *Fair*, 885 F.2d at 603.  
 11 As noted by the Commissioner, Plaintiff's allegations were  
 12 inconsistent with the record evidence which demonstrates that he  
 13 was able to attend a bowling tournament, take care of his three  
 14 year old daughter, drive, stand and walk up to 30 minutes at a  
 15 time, sit without problem, and lift up to 25 pounds. (AR 369-370,  
 16 374, 378).

17 The ALJ also noted that Plaintiff returned to gainful work  
 18 activity in 2000 and 2001, earning respectively in each year,  
 19 \$7,285 and \$8,656. (AR 20). As noted by the Commissioner, the  
 20 ability to perform gainful work contradicts Plaintiff's claim of  
 21 disabling limitations. (Ct. Rec. 18, p. 9).

22 The ALJ is responsible for reviewing the evidence and  
 23 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
 24 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
 25 trier of fact, not this Court, to resolve conflicts in evidence.  
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27       <sup>1</sup>The medical expert testified that there were no records from August  
 28 2000 to June 2002, and, in 2000, it was reported that he had a good response  
       to treatment. (AR 400). In June of 2002, two years later, he was back to  
       pre-treatment status; suggestive of non-compliance with treatment. (AR 400).

1 *Richardson*, 402 U.S. at 400. The Court has a limited role in  
 2 determining whether the ALJ's decision is supported by substantial  
 3 evidence and may not substitute its own judgment for that of the  
 4 ALJ even if it might justifiably have reached a different result  
 5 upon de novo review. 42 U.S.C. § 405(g). After reviewing the  
 6 record, the undersigned finds that the rationale provided by the  
 7 ALJ was clear and convincing for a conclusion that Plaintiff's  
 8 allegations were not entirely credible in this case.

9 **B. Medical Evidence**

10 Plaintiff contends that the ALJ erred by improperly rejecting  
 11 testimony from her treating and examining physicians of record.  
 12 (Ct. Rec. 14, pp. 38-46, 54-56). The Commissioner responds that  
 13 the ALJ properly considered and evaluated the medical evidence of  
 14 record. (Ct. Rec. 18, pp. 5-9).

15 The courts distinguish among the opinions of three types of  
 16 physicians: treating physicians, physicians who examine but do  
 17 not treat the claimant (examining physicians) and those who  
 18 neither examine nor treat the claimant (nonexamining physicians).  
 19 *Lester v. Chater*, 81 F.3d 821, 839 (9<sup>th</sup> Cir. 1996). A treating  
 20 physician's opinion is given special weight because of his  
 21 familiarity with the claimant and his physical condition. *Fair v.*  
 22 *Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir. 1989). Thus, more weight is  
 23 given to a treating physician than an examining physician.  
 24 *Lester*, 81 F.3d at 830. However, the treating physician's opinion  
 25 is not "necessarily conclusive as to either a physical condition  
 26 or the ultimate issue of disability." *Magallanes v. Bowen*, 881  
 27 F.2d 7474, 751 (9<sup>th</sup> Cir. 1989) (citations omitted).

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1       The Ninth Circuit has held that "[t]he opinion of a  
2 nonexamining physician cannot by itself constitute substantial  
3 evidence that justifies the rejection of the opinion of either an  
4 examining physician or a treating physician." *Lester*, 81 F.3d at  
5 830. Rather, an ALJ's decision to reject the opinion of a  
6 treating or examining physician, may be *based in part* on the  
7 testimony of a nonexamining medical advisor. *Magallanes*, 881 F.2d  
8 at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995).  
9 The ALJ must also have other evidence to support the decision such  
10 as laboratory test results, contrary reports from examining  
11 physicians, and testimony from the claimant that was inconsistent  
12 with the physician's opinion. *Magallanes*, 881 F.2d at 751-52;  
13 *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ may reject the  
14 testimony of an examining, but nontreating physician, in favor of  
15 a nonexamining, nontreating physician only when he gives specific,  
16 legitimate reasons for doing so, and those reasons are supported  
17 by substantial record evidence. *Roberts v. Shalala*, 66 F.3d 179,  
18 184 (9<sup>th</sup> Cir. 1995).

19       The ALJ determined that Plaintiff retained the RFC to preform  
20 a wide range of sedentary level work activities. (AR 22).  
21 Specifically, the ALJ held that Plaintiff maintained at least a  
22 two-hour standing and walking capacity, a six-hour sitting  
23 capacity, and a 10 pound lifting capacity. (AR 22-23). The ALJ  
24 also determined that Plaintiff requires medication, but he  
25 retained the ability to be/remain responsive and attentive, and  
26 was able to carry out normal work activities. (AR 23).  
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1 Plaintiff provides a list of individuals who have treated or  
2 examined Plaintiff, including Ann Lucas, Dr. Laney, Mary Noble and  
3 VA physicians and social workers, and argues that the ALJ erred by  
4 rejecting these physician's opinions in favor of other medical  
5 professionals of record. (Ct. Rec. 14, p. 56). However,  
6 Plaintiff fails to provide specific argument about any individual  
7 physician or medical source opinion that was improperly rejected,  
8 and only provides discussion as to the opinions of Ms. Lucas (Ct.  
9 Rec. 14, pp. 38-39) and the VA physician reports (Ct. Rec. 14, pp.  
10 42-45).

11 The ALJ gave a detailed review and analysis of the record.  
12 (AR 20-23). First, the ALJ addressed the medical source evidence  
13 which was the subject of the remand, Dr. Steve R. Laney's report.  
14 (AR 20, 110-112). Although Dr. Laney marked that Plaintiff was  
15 "severely limited" and thus was incapable of lifting at least two  
16 pounds and unable to stand and/or walk (AR 111), the ALJ noted  
17 that this opinion came at an early stage of Plaintiff's  
18 diagnosis/treatment and the evidence of record thereafter  
19 demonstrates Plaintiff's continued improvement (AR 20). The  
20 record further shows Plaintiff improved to a state where he was  
21 able to perform significant substantial gainful work activity.  
22 (AR 20). If he continued to be unable to lift two pounds and  
23 unable to stand and/or walk for 12 continuous months, he would not  
24 have been able to work at substantial gainful employment later in  
25 1999 and in 2000.

26 In contrast with Dr. Laney state agency reviewing physicians  
27 opined in December of 1999 that Plaintiff was limited to light  
28 exertion work activities (occasionally lifting up to 20 pounds,

1 frequently lifting 10 pounds and standing, walking and sitting  
2 about six hours in an eight hour workday). (AR 175-182).

3 The ALJ further addressed other medical reports of record.  
4 The ALJ indicated that an examination of Plaintiff by Robert Rose,  
5 M.D., on July 23, 2003, revealed a primary complaint of HIV;  
6 however, Dr. Rose found that, with regard to work-related  
7 activities and functional capacities, there was no overt physical  
8 evidence to restrict exertional capacities in terms of lifting,  
9 carrying, standing or walking. Environmental limitations were  
10 consistent with normal restrictions as to extremes of temperature,  
11 dust, or environmental exposures. (AR 20-21, 308-310).

12 The ALJ also noted the December 30, 2003 findings of Dr.  
13 Osborn. (AR 21, 317-320). Dr. Osborn found that Plaintiff could  
14 occasionally lift up to 50 pounds, frequently lift 20 pounds,  
15 stand at least two hours in an eight hour workday, sit and push  
16 and pull without restriction, and only occasionally climb, kneel,  
17 crouch, and crawl. (AR 317-318).

18 The ALJ noted that Ann Lucas, LICSW, MSW, opined on December  
19 22, 2003, that Plaintiff's prognosis was poor for being able to  
20 hold employment, he suffers from extreme fatigue and nausea, his  
21 health status varies causing difficulty in terms of work  
22 attendance and his mental health/emotional issues would hamper his  
23 ability to work. (AR 21, 271). Although the ALJ did not  
24 specifically reject Ms. Lucas' opinion, Ms. Lucas is neither a  
25 physician nor a licensed or certified psychologist. Therefore,  
her testimony and opinions do not qualify as "medical evidence . . .  
from an acceptable medical source" as required by the Social  
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1 Security regulations. 20 C.F.R. §§ 404.1513, 416.913. In  
2 addition, Ms. Lucas' finding are inconsistent with the weight of  
3 the record evidence.

4 At the administrative hearing held on January 7, 2004, Arthur  
5 Craig, M.D., testified that Plaintiff became symptomatic in July  
6 of 1999; however, after three months of treatment for HIV, his  
7 symptoms were under control. (AR 399). Dr. Craig noted that  
8 there were no records from August 2000 to June 2002, and, in June  
9 of 2002, he was back to pretreatment status. (AR 400). Dr. Craig  
10 indicated that he presumed the regression was a result of being  
11 non-compliant with treatment. (AR 400, 405-406). He noted that  
12 Plaintiff had a good response to treatment in June of 2002. (AR  
13 400). Dr. Craig testified that, in July of 2003, after resuming  
14 treatment for his HIV, Plaintiff was doing "really pretty darn  
15 good," and had few or no symptoms. (AR 406).

16 Dr. Craig noted that Dr. Osborn, an internist at the VA who  
17 specializes in the treatment of HIV, was a very reliable source.  
18 (AR 401). Dr. Craig agreed with Dr. Osborn's diagnosis of HIV,  
19 with most symptoms controlled with treatment, and with Dr.  
20 Osborn's restriction of Plaintiff to sedentary work. (AR 401).

21 Dr. Craig stated that there was no 12 month continuos period  
22 of time where Plaintiff would have been considered disabled. (AR  
23 402-404). At most, Dr. Craig opined that Plaintiff would have  
24 been unable to work for a period of six to nine months. (AR 404).  
25 He stated that, within three months of treatment, Plaintiff had  
26 "gotten over all his systemic symptoms." (AR 404). Dr. Craig  
27 testified that in 1999 Plaintiff was seriously ill and could not  
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1 work; however, Plaintiff got significantly better within a 12  
 2 month period of time between July 1999 and July of 2000. (AR  
 3 411). By July of 2000, Plaintiff could work. (AR 411).

4 The ALJ relied upon the upon the medical evidence of record  
 5 as a whole, as well as the opinions of medical expert Craig. (AR  
 6 20-23). While Plaintiff suggests a more favorable interpretation  
 7 of the evidence, the ALJ's interpretation is rational and properly  
 8 supported.<sup>2</sup> The undersigned finds that the ALJ's review and  
 9 assessment of the medical evidence of record is without error.  
 10 Substantial record evidence supports the ALJ's RFC determination  
 11 that Plaintiff is able to perform a wide range of sedentary  
 12 exertion work. (AR 22-23).

13 **C. Vocational Expert Testimony**

14 Plaintiff also contends that the ALJ erred by relying on the  
 15 vocational expert's testimony in response to a hypothetical not  
 16 presented by Plaintiff's representative. (Ct. Rec. 14, pp. 50-  
 17 52). The Commissioner responds that the ALJ properly relied on  
 18 the vocational expert's testimony which was supported by  
 19 substantial evidence and free of error. (Ct. Rec. 18, pp. 10-11).

20 Social Security Ruling ("SSR") 82-61 provides that, pursuant  
 21 to 20 C.F.R. § 404.1520(e) and § 416.920(e), a claimant will be  
 22 found not disabled when it is determined that she retains the RFC  
 23 to perform either the actual functional demands and job duties of  
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26 <sup>2</sup>The Court must ultimately uphold the Commissioner's decision where  
 27 the evidence is susceptible to more than one rational interpretation.  
 28 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). It is not the role  
 of the Court to second-guess the Commissioner. If evidence supports more  
 than one rational interpretation, the court must uphold the decision of the  
 Commissioner. *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).

1 a particular past relevant job, or the functional demands and job  
2 duties of the occupation as generally required by employers  
3 throughout the national economy. SSR 82-61.

4 "If a claimant shows that he or she cannot return to his or  
5 her previous job, the burden of proof shifts to the Secretary to  
6 show that the claimant can do other kinds of work." *Embrey v.*  
7 *Bowen*, 849 F.2d 418, 422 (9<sup>th</sup> Cir. 1988). Therefore, the burden  
8 shifts to the ALJ to identify specific jobs existing in  
9 substantial numbers in the national economy that Plaintiff can  
10 perform despite his identified limitations only after Plaintiff  
11 has established a *prima facie* case of disability by demonstrating  
12 he cannot return to his former employment. *Hoffman v. Heckler*,  
13 785 F.2d 1423, 1425 (9th Cir. 1986). The ALJ can satisfy this  
14 burden by either (1) applying the grids or (2) taking the  
15 testimony of a vocational expert. *Burkhart v. Bowen*, 856 F.2d  
16 1335, 1340 (9<sup>th</sup> Cir. 1988).

17 As determined in "Section B" above, the weight of the record  
18 evidence in this case supports the ALJ's ultimate RFC finding that  
19 Plaintiff was capable of performing a wide range of sedentary  
20 work. See *supra*. At the administrative hearing held on January  
21 7, 2004, the vocational expert testified that with the  
22 restrictions determined by the ALJ, Plaintiff retained the  
23 capacity to perform his past relevant work as a personnel clerk as  
24 well as a significant number of jobs existing in the national  
25 economy, including the positions of cashier II, telemarketer,  
26 assembler, and appointment clerk. (AR 439-441). Since the  
27 vocational expert's testimony was based on a proper RFC finding by  
28 the ALJ, Plaintiff's argument is without merit.

## **CONCLUSION**

Having reviewed the record and the ALJ's conclusions, this Court finds that the ALJ's decision is supported by substantial evidence and free of legal error. Based on the foregoing, the undersigned concludes that the ALJ properly determined that Plaintiff is not disabled within the meaning of the Social Security Act. Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 13) is  
**DENIED**.

2. Defendant's Motion for Summary Judgment (Ct. Rec. 17) is  
**GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** this file.

**DATED** this 8<sup>th</sup> day of November, 2006.

s/Michael W. Leavitt  
MICHAEL W. LEAVITT  
UNITED STATES MAGISTRATE JUDGE